

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 United States of America,

Case No.: 2:18-cr-00116-JAD-DJA

4 Plaintiff

**Order Denying Motion for
Compassionate Release**

5 v.

[ECF No. 73]

6 Eric Yokani Moreno-Ochoa,

7 Defendant

8 Defendant Eric Yokani Moreno-Ochoa moves for an early release because he wants to be
9 back with his family and he is afraid that the COVID-19 virus may reach his prison.¹ I deny
10 Moreno-Ochoa's motion because he has not demonstrated that compassionate release is available
11 or warranted.

12 **Background**

13 Moreno-Ochoa pled guilty without a written plea agreement to being a deported alien
14 found unlawfully in the United States in violation of 8 U.S.C. § 1326 and was sentenced to 50
15 months in custody followed by three years of supervised release.² His robust criminal history
16 since the age of 14 included three prior felony convictions—including one for drug trafficking—
17 and thirteen misdemeanors. This was his second § 1326 felony conviction.³ His judgment of
18 conviction was entered four months ago;⁴ he did not appeal.

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22 ¹ ECF No. 73.

23 ² ECF No. 72 (judgment).

³ PSR at 22, ¶ 112.

⁴ ECF No. 72.

Moreno-Ochoa is housed at Reeves I & II correctional institution, which is operated by the GEO Group, Inc, under contract with the Bureau of Prisons (BOP).⁵ His projected release date is October 25, 2021.⁶ In a five-sentence motion, he asks for release “under COVID19.”⁷ He offers three points and no authorities for his request:

- He wants “to be deported back to [his] Country of Mexico, to be reunited with [his] two children and [his] fiancée”;
- He has never committed a violent crime and has been on good behavior while incarcerated; and
- “This disease COVID 19 is spreading really fast and [he] fear[s] that while [he] is in custody [he] will be infected as [he] share[s] common areas with hundreds of other inmates and social distancing could not be practiced in prison.”⁸

The Federal Public Defender declined the opportunity to file a supplement on his behalf though this Court’s General Order 2020-06 permits it.⁹

Discussion

A sentencing court’s ability to modify or reduce a sentence once imposed is seriously limited.¹⁰ The compassionate-release provision of 18 U.S.C. § 3582(c)(1)(A)(i), as amended by

⁵ <https://www.bop.gov/inmateloc/> (last visited 5/15/2020).

⁶ *Id.*

⁷ ECF No. 73.

⁸ *Id.* at 2–3.

⁹ ECF No. 75. I find that this motion is suitable for disposition without a hearing or waiting for the government’s response.

¹⁰ *See United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (exploring Federal Rules of Criminal Procedure 35 and 36); 18 U.S.C. § 3582(c).

the First Step Act of 2018,¹¹ is an exception to this limitation. It allows the sentencing judge to reduce a sentence based on “extraordinary and compelling reasons” after the defendant has failed to get the BOP to bring such a motion on his behalf.¹² The court must consider the factors in 18 U.S.C. § 3553(a) “to the extent that they are applicable,” and any sentence reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.”¹³

The court may entertain an inmate’s request for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) only (1) “after [he] has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion” on his behalf or (2) after “the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.”¹⁴ This exhaustion requirement is mandatory, and an inmate’s failure to satisfy it is “a glaring roadblock foreclosing compassionate release”¹⁵ Because Moreno-Ochoa has not demonstrated that he exhausted his administrative rights before filing this motion, it must be denied for failure to exhaust.

Even if Moreno-Ochoa had properly exhausted the administrative process before filing this motion, however, I would deny it for the separate and independent reason that the record does not demonstrate that his compassionate release is warranted. Moreno-Ochoa’s reasons for wanting release are neither extraordinary nor compelling. Most inmates want to be returned to

¹¹ The First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018).

¹² 18 U.S.C. § 3582(c)(1)(A)(i).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *U.S. v. Raia*, 954 F.3d 594 (3d Cir., Apr. 2, 2020) (holding that failure to comply with § 3582(c)(1)(A)’s exhaustion requirement bars relief). *See also* my extensive analysis of the exhaustion issue in *United States v. Johnson*, No. 2:12-cr-00336-JAD-CWH, 2020 WL 2430936, at *2 (D. Nev. May 12, 2020), incorporated herein as set forth in full.

1 their families and have maintained good behavior throughout their detention, so Moreno-Ochoa's
 2 situation is entirely typical. Although the COVID-19 pandemic is undeniably grave and its
 3 impacts on every aspect of American life are unprecedented, Moreno-Ochoa does not claim that
 4 he is particularly vulnerable to it or that there are any confirmed cases of the virus among the
 5 inmate population at his facility,¹⁶ and the BOP has implemented a detailed COVID-19 response
 6 plan for federal inmates.¹⁷ Thus, I find no extraordinary and compelling reasons for Moreno-
 7 Ochoa's early release.

8 A sentence reduction for Moreno-Ochoa is also independently unwarranted under the
 9 applicable § 3553(a) factors. Among §1326 convictions, his was a serious one. As I explained
 10 at sentencing, his history—which included three felony convictions and three deportations—
 11 merited a significant sentence:

12 [B]ased on Mr. Moreno's history and the way -- the nature of the
 13 various prior felonies that he has, he has three prior felony
 14 convictions including drug trafficking and also including a prior
 1326 in this very district for which he was sentenced to 13 months
 and a day followed by three years of supervised release.

15 But the way that . . . § 2L of the guidelines is crafted and based on
 16 his particular history, **he has what I would describe as almost a**
blackout bingo card for section 2L. He checks almost every
box[,] which results in a pretty significant guideline offense
 17 **level here of 25. And then when we add in his criminal history**
category, which is a criminal history category of IV, that gives
 18 **us a significant guideline range of 84 to 105 months.**

19 . . . [But I] find based on cultural assimilation and the age of the
 20 convictions that form the basis for all of these additional
 21 computations in the guidelines and which justify a much higher
 sentence for him than many of the other people who are in here
 on a 1326 case, that some reduction is certainly necessary to the
 guideline level.

22 ¹⁶ The BOP's website is not reporting any COVID-19 cases at Reeves I & II. See <https://www.bop.gov/coronavirus/> (last visited 5/15/2020).
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¹⁷ https://www.bop.gov/coronavirus/covid19_status.jsp (last visited 5/15/2020).

1 But, of course, I also can't ignore that he has three prior
2 deportations. This is his second felony conviction under 1326, and
3 I am absolutely confident that when the last judge sentenced him to
4 13 months and a day for this very same offense, that he was
5 cautioned that his next felony under 1326 was going to earn him a
6 much larger sentence if he were to come back again. So he's going
7 to get that same lecture from me, of course, but based on the
8 totality of this situation and primarily based on cultural
9 assimilation and the age of his convictions, which form his prior
10 criminal history, I am going to vary down to a sentence of 50
11 months followed by three years of supervised release.¹⁸

8 Thus, Moreno-Ochoa's history and characteristics, the need to promote respect for the law and
9 protect the public from his crimes, and all other § 3553(a) factors weigh heavily against shaving
10 17 months off his sentence. So even if I have the ability to consider his request for relief, I
11 would deny it on its merits.

12 Conclusion

13 IT IS THEREFORE ORDERED that Defendant Eric Yokani Moreno-Ochoa's Motion
14 for Release [ECF No. 73] is **DENIED**.

15 Dated: May 15, 2020

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17 U.S. District Judge Jennifer A. Dorsey
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¹⁸ Transcript of sentencing hearing at pp. 20–22.